

Independent Contractor or Employee

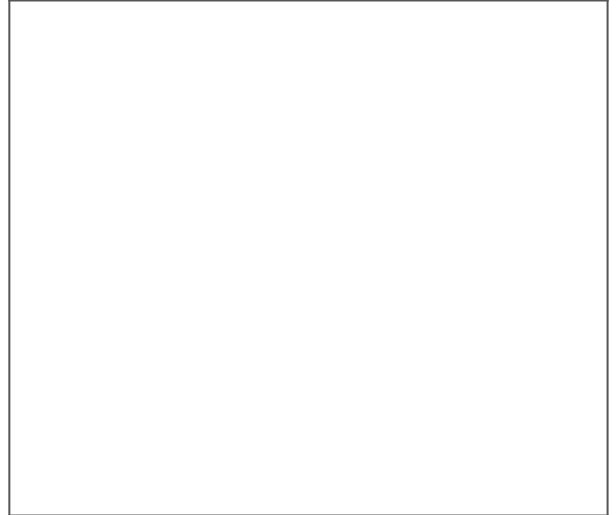
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Important Considerations

Most individuals hired by businesses to assist them in carrying out their operations will be considered to be employees. The employee will be protected by the provisions of Manitoba's Employment Standards Code (the "Code"), and will be entitled to certain benefits such as vacation pay, general holiday pay, and, upon termination of the employment relationship, reasonable notice or compensation in lieu thereof.

Not all individuals engaged by a business to provide services, however, will be 'employees' and therefore entitled to the benefits conferred by the Code. The Code specifically excludes 'independent contractors', yet does not in any way define what an 'independent contractor' is. Traditionally, independent contractors are those individuals carrying titles such as 'sales agent' or 'tradesman' – individuals who retain a relatively high degree of control and autonomy over the work performed. The tradeoff for businesses in engaging independent contractors is that they sacrifice of a certain degree of control over the individual, in exchange for the liberty to end the relationship without notice and the freedom from having to provide benefits such as paid vacation and leaves of absence.

The line between who is an employee and who is an independent contractor is not always a clear one. There will often be situations where the relationship between the parties evidences both, and the proper characterization will require careful consideration. Properly



characterizing the relationship will have important implications for both the business and the individual engaged, as it will be determinative of the parties' respective rights and obligations at law.

Within the past six months the Manitoba Labour Board (the "Board") has dealt with two cases where the issue of independent contractor/employee status was up for debate: Knights of Columbus -and- Claude Boisjoli (decision issued June 23, 2010) and Polar Windows of Canada -and- David Schick (decision issued September 30, 2010). In these decisions, the Board adopted and encouraged the analysis taken by the Supreme Court of Canada in *Sagaz* in 2001, and provided a helpful list of factors reviewed below that should be taken into account when parties are trying to determine the applicability of the Code.

The level of control over an individual's activities

One of the most important (and typically, one of the most telling) considerations is the amount and type of control that a business exerts over an individual's activities. It has been generally accepted at law that it is reasonable to expect a business to have an interest in the quality of work being done on its behalf, and a concern over the results. A business's attempt to exert some control over quality or monitor results is not the relevant focus. Rather, attention should be paid to a business's control over the "how and when" of the work: "control in this context means the right to say when the work will be done and how the individual must do it".

Indicia of control over the "how and when" can include:

- The business sets the individual's hours of work;
- The business requires the individual to check in on a regular basis;
- The individual is required to submit regular reports;
- The individual is required to attend meetings or other business-mandated activities;
- The business is responsible for scheduling the individual's day (eg, by setting up appointments and determining where the individual is required to be, at what time, and for how long).

These examples are by no means exhaustive, and there will be as many different indicia of control (or lack thereof) as there are service arrangements.

The provision by an individual of his or her own equipment

The provision by an individual of his or her own equipment in carrying out activities on behalf of the business is indicative of an independent contractor status. The weight of this factor will likely depend on the amount of equipment required, and the importance of any particular piece of equipment to the activities of the business. The more essential the equipment is to the success of the business's operations, the more indicative it will be of an independent contractor status. "Equipment" is a broad notion, encompassing items such as:

- Office space;
- Vehicle/transportation;
- Cell phone;
- Office furniture, supplies, etc.;
- Tools;
- Customer list/book of business.

The Board has found a customer list or book of business, when present, to be critical. If the business retains control over its customer base or client list, this will be indicative of an employer/employee relationship. If, however, the individual has a proprietary interest in his or her "book of business" and over particular customers, in the sense that he or she would be able to "take" the customers with them at the end of the service relationship, or sell his or her "book of business" to another, this will point towards status as an independent contractor.

The hiring by an individual of his or her own helpers

If an individual is able to hire his or her own employees to assist with carrying out the work, this will weigh in favour of an independent contractor status.

The degree of financial risk taken by an individual

An individual who performs services on behalf of a business as an independent contractor will likely be taking a much greater financial risk than an employee. A "risk" can be taken when an individual retains control over his or her own expenses, and is personally accountable for such expenses. An individual whose remuneration is based solely on commission will also be taking a greater risk than an individual who receives a consistent wage or salary regardless of their level of effort. This will be especially true when an individual has some discretion in setting prices or negotiating contracts with customers, as the price agreed upon will be

directly reflected in the individual's remuneration.

An individual's opportunity for profit or risk of loss

This factor is related closely to the degree of risk taken by an individual, and acknowledges that independent contractors, as opposed to employees, will most often face a much greater degree of financial uncertainty. While "sound management" in the performance of their activities can lead to greater profit, they may also be personally responsible for any business expenses incurred or other losses sustained. Further, if an individual does not receive any paid "time away" (no vacation pay, no sick leave pay, and so on), it is more likely that they are an independent contractor, as their absence from their duties will probably have an effect on their financial success.

An individual's degree of responsibility for investment and management

An individual may render their services through the use of a separate business name, or even through an incorporated company. While not determinative, the use of a separate business or corporation as a medium for rendering services will be an indicator of independent contractor status. Often an individual will also have a significant degree of control over, and responsibility for, the proper and successful management of their activities. If an individual's success is largely related to their own expertise and efforts, rather than those of the business on whose behalf they are rendering services, it is more probable that they are in fact in business for themselves.

Other factors

Other factors that the Board has considered include:

- **Exclusivity:** If the business is able to prevent the individual from working elsewhere, or from selling another business's products, or if it requires the individual to enter into a non-competition agreement, this is indicative of an employer/employee relationship.
- **Tax treatment:** If the individual is remitting their own taxes and deducting business expenses, this weighs in favour of independent contractor status (although again, the characterization of the relationship as evidenced by how the parties present themselves to the Canada Revenue Agency (CRA) is not determinative).
- **Benefits:** If the business has been providing the individual with benefits, such as insurance, health

care or other benefits, this will weigh in favour of an employee/employer relationship.

- Written agreement: When there is ambiguity as to the proper characterization of the relationship, the intentions of the parties as expressed in a written agreement may be considered.

Ultimately, the question to be asked in situations where the status of the business relationship is not entirely clear is “whether the person who has been engaged to perform the services is performing them as a person in business on his own account or is performing them in the capacity of an employee”. In answering this question, the totality of the parties’ relationship must be examined, and no single factor will be determinative. The above list will be helpful, but it is not exhaustive, and there will undoubtedly be additional considerations, with the importance of each depending very much on the particular circumstances.

The proper characterization of the relationship will be of importance to both parties, as their respective rights and obligations can vary considerably, depending on whether or not the provisions of the Code are applicable. Businesses and individuals alike should exercise some restraint in making assumptions about the true nature of their relationship, while giving a degree of consideration to the factors endorsed by the Board. Parties should be encouraged to use these factors to assist in structuring the relationship in a manner that will best accomplish their goals.

This article was written by Hayley Main.

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